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No. 98-337

IN THE

Supreme Court of the United States

October Term, 1998

PNEUMO ABEX CORPORATION, WHITMAN CORPORATION, CITY OF PORTSMOUTH, VIRGINIA, a municipal corporation, and PORTSMOUTH REDEVELOPMENT AND HOUSING AUTHORITY,

Petitioners,

versus

HIGH POINT, THOMASVILLE AND DENTON RAILROAD CO., NORFOLK SOUTHERN RAILWAY CO.; NORFOLK & WESTERN RAILWAY CO.; CSX CORPORATION; CSX TRANSPORTATION INC.; and FRUIT GROWERS EXPRESS CO., INC.;

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

REPLY BRIEF OF PETITIONERS

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REASONS FOR GRANTING THE WRIT

The Fourth Circuit's interpretation of "discard" conflicts dramatically with decisions of the D.C. and Eleventh Circuits and with the longstanding interpretation of the United States Environmental Protection Agency ("EPA"). As a result, the Fourth Circuit's decision disrupts settled law on the meaning of "discard," which delineates the scope of jurisdiction under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901, *et seq.* The Fourth Circuit's subjective, multi-factored test for "discard" also conflicts with the fundamental principle of liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERLCA"), 42 U.S.C. § 9601, *et seq.*, that a material no longer usable for a generator's principal business is a waste.

Contrary to the respondents' attempt to paint the Fourth Circuit's decision as fact-bound, the court's unique multi-factored test is in no way limited to the particular facts of this case. Far from restricting the reach of the decision, the multiple factors relied upon by the Fourth Circuit increase the range of its potential impact, as each factor provides new defenses for parties seeking to escape CERCLA liability.

I. The Fourth Circuit's Failure to Defer to EPA Created a Conflict Among the Courts of Appeal.

Both the D.C. and Eleventh Circuit Courts of Appeal have held that the term "discard" as used in RCRA is ambiguous and that, under *Chevron*, courts should defer to EPA in construing

the term.[1] *See American Mining Congress v. United States EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (*AMC II*), *citing American Petroleum Inst. v. United States EPA*, 906 F.2d 729, 740-41 (D.C. Cir. 1990) ("the term 'discarded' was marked by the kind of ambiguity demanding resolution by the agency's delegated lawmaking powers"); *United States v. ILCO*, 996 F.2d 1126, 1130 (11th Cir. 1993) (applying *Chevron* Step Two). In direct conflict with these decisions, the Fourth Circuit completely ignored EPA's interpretation of "discard" and instead created its own.

The Fourth Circuit defined "discard" according to a multi-factored test that includes the material's value for reuse. The D.C. and Eleventh Circuits, in deferring to EPA, have held just the opposite. *See American Petroleum*, 906 F.2d at 741 n.16 (whether a "method of waste treatment . . . results in the production of something of value, namely, reclaimed metals" is "immaterial" to whether the substance being treated is waste under RCRA); *ILCO*, 996 F.2d at 1132 (whether a recyclable material is "valuable feedstock" is irrelevant to whether the material is "discarded").

In an attempt to obscure this clear split among the courts of appeal, the respondents quote portions of an earlier, superseded case from the D.C. Circuit, *AMC I*.[2] Respondents' Brief ("Resp.

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[1] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Contrary to the respondents' claim that this issue was not before the Fourth Circuit, *AMC II* and related cases, all of which discuss and apply the *Chevron* standard to interpret "discard," were discussed in Appellees' Brief, pp. 18-19.

[2] *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987).

Br.") 14, 17, 20. The respondents claim there is no circuit split because in *AMC I* the D.C. Circuit, like the Fourth Circuit in this case, refused to defer to EPA and substituted an "ordinary, common meaning" test to find there was no discard. *Id.* The D.C. Circuit, however, superseded these aspects of *AMC I* in *American Petroleum* and its progeny, including *AMC II*, which deferred to EPA's interpretation of discard under *Chevron* Step Two. *American Petroleum*, 906 F.2d at 740-41; *AMC II*, 907 F.2d at 1186. Not only did the D.C. Circuit supersede *AMC I*'s *Chevron* Step One analysis, but it limited *AMC I*'s holding of "no discard" to the narrow facts of that case:

> [*AMC I*]'s holding concerned only materials that are destined for *immediate reuse* in another phase of the industry's ongoing production process, and that have not yet become part of the waste disposal problem. Nothing in [*AMC I*] prevents the agency from treating as "discarded" the wastes at issue in this case, which . . . are *not* part of ongoing industrial processes.

AMC II, 907 F.2d at 1186 (emphasis in original; citations and quotation marks omitted); *see also Chem. Waste Management, Inc. v. United States EPA*, 976 F.2d 2, 14 (D.C. Cir. 1992) ("Our decision in [*AMC I*] stands for no more.").[3]

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[3] The respondents selectively quote from *Owen Elec. Steel Co. v. Browner*, 37 F.3d 146, 149 (4th Cir. 1994) to claim it adopted the *AMC I* "ordinary meaning" analysis of discard. (Resp. Br. 14). The *Owen* court did no such thing. The *Owen* court described how subsequent cases rejected the *AMC I* analysis, and went on to follow these cases and EPA's interpretation to hold that "the fundamental inquiry in determining whether a byproduct has been 'discarded' is whether the byproduct is immediately recycled for use in the same industry." 37 F.3d at 150.

The respondents' effort to eliminate the conflict by distinguishing the D.C. and Eleventh Circuit cases is similarly flawed. The respondents assert that, unlike the materials in those cases, their scrap was never abandoned before being recycled. However, those courts found the defendants' waste to be discarded not because it was abandoned but because it was not immediately reused. *AMC II*, 907 F.2d at 1186; *ILCO*, 996 F.2d at 1132. It is undisputed that the respondents' scrap was not immediately reused. Whether it was "abandoned" is irrelevant. *Military Toxics Project v. EPA*, 146 F.3d 948, 951 (D.C. Cir. 1998) ("the statutory definition . . . encompasses 'discarded material' without requiring that the material have been abandoned").

II. The Fourth Circuit's Opinion Conflicts With EPA's Longstanding Administrative Interpretation and Will Disrupt the RCRA Regulatory and Criminal Enforcement Programs.

The respondents argue that the Fourth Circuit's decision does not disrupt the RCRA program because EPA has exempted certain recyclable materials from regulation under a part of RCRA, subchapter III. However, those discrete regulatory exemptions are utterly irrelevant to the meaning of "discard" as used in RCRA's *statutory* definition of "solid waste," which applies to all other aspects of RCRA and which is the only definition that is relevant here. Those regulatory exemptions have no bearing on the statutory term "discard," which delineates the universe of materials over which EPA has authority to regulate in the first place. 40 C.F.R. § 261.1(b); *see, e.g., Military Toxics Project v. EPA,* 146 F.3d 948, 951 (D.C. Cir. 1998) ("[A]lthough the EPA has narrowed the definition of solid waste for purposes of Subtitle C [*i.e.*, subchapter III], the statute itself still provides the relevant

definition for [another purpose]").

Moreover, by their own terms, the exemptions would not apply to the respondents' waste.[4] Indeed, in the same Federal Register that the respondents quote (Resp. Br. 15), the EPA explained:

> [F]or purposes of the regulations implementing Subtitle C of RCRA, all scrap metal that would be hazardous *is a solid waste* when disposed of *or when recycled* . . . Scrap metal is waste-like in that it is a used material *that is no longer fit for use* and must be reclaimed before it can be used again.

50 Fed. Reg. 614, 624 (Jan. 4, 1985) (emphasis added).[5]

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[4] The respondents quote 40 C.F.R. section 261.2(e)(1) (as it read prior to its amendment on August 24, 1998). Section 261.2(e)(1)(iii) applies only when a process uses new materials as principal feedstocks, which is not the case here. 40 C.F.R. § 261.1(c)(4). Section 261.2(e)(ii) applies to materials substituted for commercial end products, not ingredients. Section 261.2(e)(1)(i) applies to materials used as ingredients only if the materials are not being "reclaimed," which means materials processed to recover a usable product. The scrap metal parts at issue were reclaimed when "the Foundry heated the dirty wheel bearings in a low temperature furnace to 'sweat off' the dirt, grease, and any impurities and to separate the back from the lining." (Appendix to Petition 9).

[5] Even when later exempting particular scrap metals from its subchapter III regulations, EPA specifically declined to exempt "obsolete scrap metal (scrap which is composed of worn out metal or a metal product that has outlived its original use, such as...railroad cars...)." 62 Fed. Reg. 25998, 26011 (1997).

As to the *statutory* terms "solid waste" and "discarded material," EPA has repeatedly articulated its longstanding interpretation as follows:

> The proper test as to when, as a matter of law, the Agency is foreclosed from classifying a material as a solid waste [or discarded] is when a material is "destined for immediate reuse in another phase of the industry's ongoing production process"...

63 Fed. Reg. 42110, 42113 (Aug. 6, 1998).[6] The Fourth Circuit's interpretation of "discard" conflicts with this longstanding interpretation and disrupts EPA's authority to regulate materials destined for recycling.[7]

III. The Factors Relied Upon by the Fourth Circuit and the Respondents Are Irrelevant to CERCLA Liability.

The respondents argue that the pollution "would have been no different" if Abex had used virgin material in its process and that the parties intended the scrap to be entirely reused. (Resp. Br. 19). The district court made no findings on these issues

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[6] *See also* 61 Fed. Reg. 2338, 2341 (1996); 60 Fed. Reg. 57747, 57752 (1995); 59 Fed. Reg. 38536, 38536 (1994); 55 Fed. Reg. 50450 (1990).

[7] The disruption to this settled law inherent in the Fourth Circuit's opinion is apparent from the respondents' attempts to resurrect the discredited, "common, ordinary meaning" analysis of *AMC I*. (Resp. Br. 17-18). Until superseded by the *American Petroleum Inst.* and *AMC II* cases, this language created years of confusion, as regulated entities argued in favor of a subjective definition of discard.

because they are not relevant to CERCLA liability. (Appendix to Petition 27-40). Fault and intent are simply not elements of CERCLA's strict liability scheme. *E.g., B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996) (CERCLA is a strict liability statute); *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (arranger liability does not require specific intent).[8] The fact that other activities, not dealing with the processing of wastes, also can lead to contamination, does not alter CERCLA's scheme for holding covered parties, who engage in covered activities, strictly liable.

Congress intended that "those who 'benefit financially from a commercial activity' internalize the environmental costs of the activity as a cost of doing business." *B.F. Goodrich*, 99 F.3d at 514. As parties who benefitted financially from a reclamation transaction, and who arranged for disposal and treatment of their worn-out scrap bearings in a process that contaminated the environment, the respondents are among the categories of parties deemed liable by Congress. Any arguments about whether contamination would have been better or worse if the constituents had instead come from some other hypothetical source are relevant, if at all, only to the parties' relative equitable shares of the liability. *See* 42 U.S.C. § 9613(f) ("the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

The respondents make much of the parties' intent to

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[8] The Fourth Circuit's use of "intent to reuse" in its new, multi-factored test for "discard" adds a subjective element to RCRA's definition of waste that will be especially disruptive to the RCRA criminal enforcement program.

"entirely reuse" their worn journal bearings. (*E.g.*, Resp. Br. 1, 5, 6, 7). Whatever the parties' intentions, the material clearly was not entirely reused. As part of the reclamation process, impurities were sweated off and disposed of in the foundry's back lot. (Appendix to Petition 9, 23). Moreover, these impurities were later determined to contain recoverable amounts of metal, demonstrating that they contained hazardous substances. (Appendix to Reply 1). Constituents were also lost to the environment due to air emissions and due to contamination of foundry sand with metals. (Appendix to Petition 9, 23). The respondents' reliance on "intent to reuse" in the face of these undisputed facts demonstrates the potential for manipulation and abuse inherent in the Fourth Circuit's subjective test.

IV. The Fourth Circuit's Decision Conflicts With Fundamental Principles of CERCLA Liability Recognized by the Ninth Circuit.

The respondents argue that there is no conflict because courts generally have exempted from liability materials that are sold for value or sold for productive use. (Resp. Br. 8-10). This is simply untrue.[9] In contrast to the Fourth Circuit, the Ninth Circuit has recognized that if a material is "no longer usable for [the generator's] principal business, then it [is] waste." *A & W Smelter and Refiners v. Clinton*, 146 F.3d 1107,

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[9] Additionally, the respondents imply that other circuits have keyed CERCLA arranger liability to the RCRA term "discard." (Resp. Br. 2, 8). This is not the case. While other circuits may have occasionally used the word "discard," the Fourth Circuit is the only appellate court to expressly interpret the RCRA phrase "discard" in order to rule on CERCLA liability.

1113 (9th Cir. 1998);[10] *see also Gould v. A & M Battery & Tire Serv.*, No. 3-CV-91-1714, 1996 U.S. Dist. LEXIS 11352 (M.D. Pa. July 15, 1996) ("Every court that has ruled on the issue has held that if a product has no value for the purpose for which it was manufactured and it contains a hazardous substance, then the sale is an arrangement to dispose of the hazardous substance.").

In *A & W Smelter*, 146 F.3d at 1112, the Ninth Circuit pointed approvingly to a decision by one of the courts in its circuit, *California v. Summer Del Caribe, Inc.*, 821 F. Supp. 574 (N.D. Cal. 1993), which more fully explains the useful product doctrine:

> the "sale of a useful product" defense applies when the sale is of a new product, manufactured specifically for the purpose of sale, or of a product that remains useful for its normal purpose in its existing state. In contrast, the courts have consistently rejected the "sale of a useful product" defense when the purpose of the sale is to get rid of or treat a waste or by-product.

821 F. Supp. at 581. It is undisputed that the defendants' scrap metal was unfit for its original purpose and that the defendants were not in the business of producing scrap metal. Under the "useful product" doctrine, respondents are liable as CERCLA arrangers.

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[10] The Ninth Circuit sought a determination of whether the ore at issue was useful for A & W's principal business purpose, which it was unable to find in the record. The case was remanded to determine this issue. *A & W Smelter*, 146 F.3d at 1113.

V. The Fourth Circuit's Multi-Factored Inquiry Will Have Severe Effects on RCRA and CERCLA.

The Fourth Circuit erred by adopting a new legal standard for "discard," in conflict with the settled law of other circuits and without regard for EPA's longstanding administrative interpretations. The effects of this error will be particularly far-reaching because the Fourth Circuit's test concerns the jurisdictional term "discard," a concept fundamental to administration of RCRA. The court's opinion, far from being fact-bound, radically reinvents both CERCLA and RCRA to encourage parties to offer previously irrelevant arguments in an effort to exempt themselves from liability under these two key environmental statutes. The Fourth Circuit's opinion should be reviewed by this Court.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

PNEUMO ABEX CORPORATION, et al., Plaintiff,	)
v.	) Civil Action
BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC., et al., Defendants,	) No. 2:94cv716
and	)
NORFOLK SOUTHERN RAILWAY COMPANY and NORFOLK AND WESTERN RAILWAY COMPANY, et al., Third-party Plaintiffs,	)
v.	)
THE RUNNYMEDE CORPORATION, et al., Third-Party Defendants.	)

DEPOSITION UPON ORAL EXAMINATION
OF ELMER G. OAKES, JR.,
TAKEN ON BEHALF OF THE DEFENDANTS

Norfolk, Virginia
November 15, 1995
Volume II

* * *

[392]

Q. What was done with the slag that was generated in connection with the melting done in the [393] furnaces?

A. That was also placed on the back lot.

Q. Did that slag have any metal content?

A. We later learned it did, yes, sir.

* * *